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IN THE

Supreme Court of the United States

October Term, 1963
No. 5, Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE STATE OF CALIFORNIA,

Defendant.

State of California's Response to Amicus Curiae Brief Heretofore Filed by Carl Whitson; Memorandum in Opposition to Whitson Motion for Permission to Orally Argue; and Memorandum in Opposition to Filing of Reply or Supplemental Brief by This Amicus Curiae.

Preliminary Statement.

By order, entered on May 18, 1964, this Court denied the motion of Carl Whitson to file a petition for intervention herein but granted an alternative motion by him for leave to file a brief as *Amicus Curiae.* On June 29, 1964, Mr. Whitson filed a "Brief of Amicus Curiae." Thereafter, on about July 6, 1964, Mr. Whitson filed with this Court his "Motion to Permit Amicus Curiae Special Permission to Appeal for Oral Argument and For One Hour of Time Additional." Moreover, without securing any subsequent order from this Court, Mr. Whitson, on August 3, 1964, served

upon the California Attorney General a "Reply or Supplemental Brief of Amicus Curiae."

In this one document California hereby: (1) submits its Answer to Mr. Whitson's Amicus Curiae Brief filed on June 29, 1964; (2) refuses to consent to Mr. Whitson's participation in oral argument and actively opposes this Amicus Curiae's request to be allowed to argue orally; and (3) objects to the filing of Mr. Whitson's Reply or Supplemental Brief.

I.

Answer of the State of California to the Brief of Amicus Curiae Heretofore Filed.

Pursuant to this Court's order of May 18, 1964, Carl Whitson submitted a "Brief of Amicus Curiae" which was filed on June 29, 1964. California will answer on the merits the first argument in that Amicus Curiae Brief concerning the criteria for establishing the line of ordinary low water off the City of Long Beach, since this is the only issue raised by Mr. Whitson which is even remotely connected with the instant case. As California will hereinafter point out, all of the remaining arguments presented in the Whitson Amicus Curiae Brief are completely unrelated to the issues presented to this Court by the parties, and such extraneous matters should be disregarded.

A. The Location of the Line of Ordinary Low Water Off the City of Long Beach Is Immaterial in This Case. Moreover the Criteria Proposed by Amicus Curiae for That Purpose Are Erroneous.

In his brief filed June 29, 1964, Amicus Curiae urges that the "ordinary low water mark" or low tide line off the City of Long Beach should be "the shore line

as it existed in 1850 when California joined the Union, plus any natural change thereto" (Whitson A. C. Brief, pp. 2-3). Then, Mr. Whitson asks this Court to decide, as a matter of law, "that the coast line as established by the earliest U. S. Coast Survey Map is the correct line" (Whitson A. C. Brief, p. 4.)[1] However, Amicus Curiae cites no authority whatever for the position advocated by him. Instead, Mr. Whitson merely alludes (Whitson A. C. Brief, p. 2) to the Supplemental Complaint filed by the United States herein, in which document the Government alleged that the "ordinary low-water mark" as used in the decree of this Court (332 U. S. 804, 805) and in the Submerged Lands Act (67 Stat. 29; 43 U. S. C. §§1301-15) should be understood to mean the line where the average level of all low waters meets the shore "as the shore may be modified at any time by gradual natural accretion, erosion or reliction or, if the shore has been artifically modified, where the average level of all low waters met the shore as it last was preceding such artificial modification." (Supplemental Complaint, Para. IX.) Significantly, since the filing of the aforementioned Supplemental Complaint the United States changed its position and now agrees that the line of ordinary low water used in the Submerged Lands Act is to be measured at least from the shore as it existed on the date of the enactment of the Submerged Lands

[1]Amicus Curiae asserts that the first U. S. Coast Survey Map relating to the Long Beach area was made in 1859. (Whitson A.C. Brief, p. 3.) In fact, the first such map of this area was prepared in 1853 by the United States Coast Survey and is entitled "Western Coast of the United States." As shown in the text, however, the date of 1850 is irrelevant for purposes of establishing the line of ordinary low water under the Submerged Lands Act.

Act (May 22, 1953), irrespective of any prior artificial modifications; and that in the future such line will move as the result of natural changes.[2] (U. S. Brief in Support of Exceptions (April, 1964), pp. 16-25.)

Most important, California asserts, and the United States apparently concedes, that factually, all the waters overlying tide and submerged lands within the City of Long Beach are inland waters within the meaning of the Submerged Lands Act, so that this Court need not determine the location of the line of ordinary low water within the limits of that City. Sections 3(a) and 2(a)(2) of the Submerged Lands Act provide that the three geographical miles of submerged lands restored to the State are to be measured from the coastline of the State. Section 2(c) defines coastline to mean "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." Thus, if a particular area constitutes inland waters, the coastline, for purposes of the Act, is the seaward limit of such waters, and the line of ordinary low water within inland waters is totally irrelevant in this litigation.

The City of Long Beach is situated easterly of Los Angeles Harbor and entirely landward and within what is known as the "outer breakwater" in San Pedro Bay. (See map opposite p. 104 of Vol. II of Calif. Brief in Support of Exceptions (April, 1964); see also U. S. Exhibit H. Before the Special Master.) This

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[2]California insists that future artificial changes will also move the line of ordinary low water as employed in the Act. (Calif. Reply Brief (June 1964), pp. 11-25.) Such changes, however, are of no immediate concern in answering the brief of Amicus Curiae.

breakwater was completed in 1949.[3] The United States concedes, as it must, that all water areas enclosed by artifical structures erected prior to May 22, 1953, constitute inland waters for purposes of the Submerged Lands Act. (U. S. Brief in Support of Exceptions (April, 1964), p. 17.) It follows that all the waters overlying tide and submerged lands within the City of Long Beach are inland waters. The concession of the United States relative to artificial harbor works prior to 1953 is, of course, compelled by the Submerged Lands Act and its legislative history. Section 2(a)(3) of the Act defined lands beneath navigable waters as including, among other areas, "all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters." Such lands within the boundaries of the states were restored to them by Section 3(a) of the Act. The three geographic miles restored to the states were intended by Congress to be measured from the outer limits of such accretions and filled lands. (See Hearings in Executive Sessions Before the Committee on Interior and Insular Affairs, United States Senate, 83d Cong., 1st Sess. on S. J. Res. 13, etc., Part 2, pp. 1354-57.) Artificial harbor-works undoubtedly are included within the meaning of artificial accretions or filled or made lands. Consequently, in the Long Beach area the three miles must be measured at least from the seaward side of the "outer breakwater."

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[3]The first or westerly segment of this "outer breakwater" was commenced in 1899 and completed in 1912. The second or middle segment was completed in 1937. The third or Long Beach segment was commenced in 1942 and completed in 1949. (Testimony of E. C. Earle, Chief Harbor Engineer, Los Angeles Board of Harbor Commissioners, Transcript of Hearings before the Special Master, p. 526.)

Furthermore, the Special Master recommended that, absent contrary evidence, the water areas within artificial permanent harborworks should be classified as inland waters. (Rep. pp. 4, 46-48.) California has heretofore pointed out that under the theory of the case upon which the Special Master proceeded, his recommendations concerning artificial changes in the shoreline, including artificial harborworks, were correct when made. (See Calif. Reply Brief (June, 1964), pp. 13-17.) Clearly, under the Special Master's view, the water areas between the Long Beach mainland and the "outer breakwater" comprise inland waters.

Finally, California contends that any water areas within the boundaries of the City of Long Beach are also within San Pedro Bay and the "Overall Unit Area," and thus constitute inland waters of the State of California within the meaning of the Submerged Lands Act. (See Calif. Brief in Support of Exceptions, Vol. I, pp. 40-59, 63, 131-35; Vol. II, pp. 94-130; Calif. Closing Brief (July, 1964), pp. 30-53.)

We respectfully submit that the water areas overlying tide and submerged lands within the City of Long Beach undeniably are inland waters within the meaning of the Submerged Lands Act, and the ascertainment of the location of the line of ordinary low water within such inland waters is not herein material.[4]

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[4]Amicus Curiae asserts that the Court has referred to the water area east of Point Fermin as the Pacific Ocean in *Borax Consolidated Co. v. Los Angeles*, 296 U. S. 10, 22 (1935). (Whitson A.C. Brief, p. 3.) The Court did not settle the status of such water area; it dealt only with title to tidelands, that is lands over which the daily tides ebb and flow. In fact, the Court referred to the area in question in that case as the "'. . . tideland of Morman Island situated in the inner bay of San Pedro now known as Los Angeles Harbor." (296 U.S. at 12.)

There are, of course, areas in California outside of the City of Long Beach, where the location of the line of ordinary low water is important for purposes of this case. The criteria proposed by Amicus Curiae for this ascertainment are clearly incorrect. As shown above, the Submerged Lands Act restored all artificially filled or made or accreted lands to the respective states at least as of the date of the Act, 1953. (Sections 2(a)(3), 3(a).) Furthermore, the three geographical miles involved were intended to be measured from the seaward side of such accretions. (1953 Senate Hearings, *supra*, p. 1357.) It follows that early United States Coast Survey Charts relating to the shoreline as of 1850 and the time of Admission of California into the Union would be of no use in establishing the line of ordinary low water as embodied in the Submerged Lands Act, as such charts would not reflect artificial changes either as of 1953 (as the United States contends) or as of now and in the future (as California maintains).

B. The Remaining Arguments of Amicus Curiae Raise New Questions Not in Issue Between the United States and California, and These Contentions Should Be Disregarded.

Neither of the two remaining issues presented by Amicus Curiae in his June 29, 1964 brief is even remotely pertinent to the instant dispute between the United States and the State of California over the extent of the submerged lands restored to the State by the Submerged Lands Act. Specifically, Mr. Whitson asks this Court for the following determinations:

> "2. That Long Beach was granted all offshore submerged lands below low tide line, extending seawards into the Pacific Ocean three miles within

the city boundaries. That the title to such lands was a fee simple title without trusts or restrictions on the use of the lands or income received therefrom.

"3. That the State of California is powerless to take any of the submerged lands within Long Beach from the city or taxpayers, and has no legal power or right to take any income from such lands or place any trusts or control on any such lands or funds." (Whitson A. C. Brief, p. 12.)

Amicus Curiae seeks to inject into this suit completely new and extraneous contentions relating to: (1) an alleged controversy between the City of Long Beach and lands granted to the City of Long Beach in trust by the State of California; and (2) whether the State of California is legally empowered to alter or revoke the trust relationship between itself and the City of Long Beach as to submerged lands within the city's boundaries.

It is clear that this Amicus Curiae improperly seeks to broaden the scope of the instant litigation. As heretofore pointed out, on May 18, 1964 this Court expressly denied Mr. Whitson's petition for intervention, although it granted his alternative motion for leave to file a brief, as amicus curiae. Had Mr. Whitson been allowed to intervene, he would have been required to take the case as it existed and would not have been allowed to expand or change the issues. As the Court stated in *Chandler Co. v. Brandtien, Inc.*, 296 U.S. 53, 57-58 (1935):

". . . The intervenor was not entitled to come into the suit for the purpose of having adjudicated

a controversy solely between it and plaintiff. Issues tendered by or arising out of plaintiff's bill may not by the intervenor be so enlarged. It is limited to the field of litigation open to the original parties."

See also:

Thompson v. Deal, 49 F. Supp. 366, 369 (D.D.C., 1943);

Slusarski v. United States Lines, Co., 28 F.R.D. 388, 390 (E.D. Pa., 1961).

Since Mr. Whitson as an intervenor could not have raised the new issues he seeks to inject into this case

In the past this Court has refused to pass upon issues raised by an amicus curiae alone and not raised by the parties.

Knetsch v. United States, 364 U.S. 361, 370 (1960).

Similarly, it is well settled that an amicus curiae is not a party to the action, but is merely a friend of the court whose sole function is to advise or make suggestions.

Clark v. Sandusky, 205 F. 2d 915, 918 (7th Cir. 1953);

Garland Co. v. Filmer, 1 F. Supp. 813 (N.D. Cal. 1932).

"Furthermore, an amicus curiae has no right to take over the management and control of the case."

Klein v. Liss, 43 A. 2d 757, 758 (D.C. Munic. Ct. of Appeals, 1945).

II.

Memorandum in Opposition to the Whitson Motion for Permission to Orally Argue.

On about July 6, 1964, Mr. Carl Whitson filed his "Motion to Permit Amicus Curiae Special Permission to Appear for Oral Argument and for One Hour of Time Additional."

Pursuant to Rule 44(7) of the Supreme Court Rules, the State of California refuses to consent to the use by Carl Whitson, or his counsel, of any portion of the time allocated to the State for oral argument herein.

Moreover, California actively opposes this Amicus Curiae's Motion to be permitted to participate in the oral argument of this case. Pertaining to motions seeking special leave for counsel for Amicus Curiae to argue orally, Rule 44(7) of this Court, in part, provides: "Such motions, unless made in behalf of the United States or of a State, Territory, Commonwealth, or Possession, are not favored." California respectfully suggests that this policy should be particularly applicable to the Whitson Motion for Special Permission since this Amicus Curiae, in his Brief heretofore filed and in his Motion, has made it abundantly clear that he intends to raise and argue issues extraneous to the ascertainment of the seaward boundaries of California under the Submerged Lands Act. Indeed, the Movant's intention to divert this case from a boundary dispute between the United States and California, into a collateral controversy between the State and the City of Long Beach, is best illustrated by the substantive content of his Motion, which on page 2 recites:

> "Within Long Beach, California, is located one of the largest known oil and gas fields in Cali-

fornia. The tide and submerged lands are owned by the City, but claimed by the State of California. The amount involved is about Five Billion Dollars ($5,000,000,000.00) of oil and gas income.

"There are special boundary line issues, and title issues, involved in the offshore submerged lands within Long Beach, California, which need special attention by this Court; and need special clarification at oral argument, in addition to the amicus curiae briefs filed with the Court.

"There are about three thousand (3,000) acres of adjacent upland oil lands divided into about ten thousand (10,000) parcels or lots known to be in the same oil pool with the offshore submerged lands. These upland lots are owned by about five thousand (5,000) private owners, many of whom belong to the Upland Oil Lot Owners Association, and the undersigned, Carl Whitson, is Chairman of the Association as owner of some of the lots. All of the upland lot owners have a special private interest in the title, income and use of funds received from production and sale of oil and gas as the new contracts and leases on offshore submerged lands are to be unitized with upland lots and paid on a percentage basis. Also all upland lot owners are taxpayers of the City and have an interest as such in addition to private rights." (Motion to Permit Amicus Curiae Special Permission to Appear For Oral Argument and For One Hour of Time Additional.)

III.

Memorandum in Opposition to Filing of Reply or Supplemental Brief by This Amicus Curiae.

Heretofore, this Court on May 18, 1964, granted Mr. Whitson's "alternative motion for leave to file a brief, as *amicus curiae.*" He did file "a brief, as *amicus curiae*" on June 29, 1964. Again, on August 3, 1964, the Attorney General of the State of California was served with a "Reply or Supplemental Brief of Amicus Curiae." It is our understanding that this latter document will not be filed without an order of this Court so permitting.

California objects to the filing of a second brief by this Amicus Curiae on the following grounds:

(1) This Amicus Curiae already has been afforded one opportunity to present his arguments on the issues of this case as framed by the parties and the proffered "Reply or Supplemental Brief of Amicus Curiae" adds nothing to a discussion of such material issues;

(2) In the manner heretofore pointed out, the Amicus Curiae brief filed June 29, 1964 by Mr. Whitson improperly attempted to broaden the scope of the instant boundary litigation between the United States and California by endeavoring to interject into this suit an alleged title controversy between the City of Long Beach and the State of California over certain submerged lands restored to the State by the Submerged Lands Act;

(3) That the "Reply or Supplemental Brief of Amicus Curiae" deals almost entirely with matters unrelated to the instant boundary dispute between the United States and California. The proffered brief primarily is aimed at establishing that the City of Long Beach holds submerged lands within its borders free from the statutory trusts upon which they were granted to the City by the State, and that the State of California cannot validly modify or revoke such statutory trusts. These allegations are wholly extraneous to the issues before this Court in this case.

Conclusion.

It is respectfully submitted that the location of the line of ordinary low water along the City of Long Beach is completely immaterial in this case for the reason that all of the waters overlying tide and submerged lands within that City are clearly inland waters and the areas restored to California by the Submerged Lands Act must be measured three geographical miles from the seaward limit of inland waters. In addition, the criteria Amicus Curiae advocates for locating such low water line are patently erroneous.

Moreover, California requests that this Court disregard the remaining arguments in the Whitson Amicus Curiae Brief filed June 29, 1964, for the reason that they are outside the material issues involved in the instant case.

California further requests that this Amicus Curiae's motion for permission to participate in oral argument be denied, and that Mr. Whitson be refused permission to file his proffered Reply or Supplemental Brief.

Respectfully submitted,

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Dated: August 11, 1964.

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